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No. 82-940

IN THE

Supreme Court of the United States

October Term, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the decision to promote an attorney to partnership at a large institutional law firm organized as a partnership subject to Title VII of the Civil Rights Act of 1964 and thus one which must be made without regard to race, sex, religion or national origin?

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The Anti-Defamation League of B'nai B'rith and the American Jewish Congress respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-captioned case should be reversed.

Petitioner and Respondent have consented to the filing of this brief and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion or ethnic origin.

The American Jewish Congress, which was founded in 1918, is a membership organization of American Jews dedicated to the elimination of racial, religious and sexual discrimination from American life and to the protection of the civil rights of Jews and of all Americans.

Among their many other activities directed to these ends, the Anti-Defamation League and the American Jewish Congress (AJC) have in the past filed *amicus curiae* briefs in this Court urging the unconstitutionality or illegality of discriminatory laws or practices, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Dewey* v. *Reynolds*, 402 U.S. 689 (1971); *Parker Seal* v. *Cummins*, 429 U.S. 65 (1976), *vacated and remanded*, 433 U.S. 903 (1977); *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977); and *Sumitomo Shoji America, Inc.* v. *Avigliano*, ___U.S. ___, 102 S. Ct. 1764 (1982). The ADL and the AJC are able to bring to the issues raised on this appeal the perspective of national organizations dedicated to safeguarding all persons' right to equal treatment.

The *amici* seek to submit the accompanying brief because they believe this case presents a serious question regarding a practice which permits a given class of employers, *e.g.*, major institutional law firms, to engage in discriminatory practices while others are barred from engaging in such conduct.*

Respectfully submitted,

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* The Anti-Defamation League and the American Jewish Congress file this brief on their own behalf and on behalf of the following national organizations of American Jews which share their commitment: National Council of Jewish Women, the Union of American Hebrew Congregations and Women's American ORT.

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, a female lawyer, was employed as an associate by the law firm of King & Spalding from 1972 until her discharge in 1979. King & Spalding, a general partnership engaged in the practice of law, with offices in Atlanta, Georgia and Washington, D.C., is comprised of more than one hundred attorneys and more than fifty non-legal personnel. Throughout her tenure at King & Spalding, petitioner had received consistently good evaluations. In 1979, petitioner was denied partnership in the firm and notified that pursuant to the firm's "up or out" policy (i.e., those who are not admitted to partnership may not stay on as associates) her employment would be terminated on December 31, 1979. As of that date, in the one hundred year history of the firm, King & Spalding had never admitted a woman to partnership. Petitioner filed a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, charging the firm with discrimination on the basis of sex.

The United States District Court for the Northern District of Georgia dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *Hishon* v. *King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980). The district court held that Title VII does not extend to a person denied admission to partnership by a law firm, since partners are not employees.

On appeal, the Court of Appeals affirmed. *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982). The court based its decision on the traditional notion of a partnership as the "voluntary joinder of all parties with each other", upon which the court was not empowered to encroach under Title VII. The court determined that an invitation to partnership does not fall within the coverage of Title VII because it is neither an employment opportunity nor a term and condition of employment.

SUMMARY OF ARGUMENT

There is but one issue raised in this case—the applicability of Title VII to the decision of a large institutional law firm to promote an associate into the partnership. *Amici* submit that Congress intended Title VII to be so applied.

There has been a long and documented history, pre and post enactment of Title VII, of exclusion of different groups from the partnership ranks. A decision by this Court that Title VII does not apply to this process will have the effect of sanctioning this discrimination and allowing it to perpetuate.

Amici contend that partnership decisions are subject to Title VII. The relationship that large institutional law firms have with their associates clearly falls within the language of the statute. Congress explicitly included "partnerships" in Title VII. These firms, including King & Spalding, employ more than the statutorily required fifteen persons. Further, the non-discriminatory consideration for promotion to partner while associates are still employees is a "term, condition or privilege of employment" explicitly covered by Title VII. Applying Title VII to the hiring of associates at these firms but not their promotion to partnership would produce inequitable results. Law firms would be required to hire associates on a non-discriminatory basis but then permitted to discriminate against them in promotion to partnership.

Moreover, King & Spalding cannot assert that it has a right to discriminate in this process because it is a voluntary association. A constitutional right of association can only be asserted in connection with a legitimate First Amendment activity. It cannot be used to protect the partnership decisions of large institutional law firms engaging primarily in ordinary professional and business acivities from the prohibitions of Title VII.

Nor can this type of discrimination be justified under the right of privacy. That right exists only in the context of an intimate or familial relationship but does not exist to permit a business and professional enterprise such as King & Spalding to discriminate in promoting attorneys to partnership.

Finally, even assuming that King & Spalding can invoke the right of voluntary association, that right must be weighed against Congress' power to prohibit discrimination under the Commerce Clause. Courts have already acknowledged that Title VII applies to the relationship between a law firm and its associates. Moreover, applying Title VII to partnership decision furthers a compelling governmental interest in banning discrimination. And, application of Title VII to King & Spalding's promotional practices will still enable them to choose the best candidates for partnership; albeit in a non-discriminatory manner. Thus, King & Spalding's asserted right of association must give way to Congress' commerce power.

ARGUMENT

I.

THE HISTORY OF DISCRIMINATION IN PROMOTING ATTORNEYS FROM ASSOCIATE TO PARTNER AT LARGE INSTITUTIONAL LAW FIRMS MANDATES THE APPLICATION OF TITLE VII TO THOSE DECISIONS

The issues in this case clearly transcend the question of discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits discrimination in employment on the basis of race, color, religion and national origin, in addition to sex. Prior to the enactment of Title VII, there was a clear history of employment discrimination in the large institutional law partnerships. Even with the passage of this Act, that discrimination has continued.

Over time, different groups have suffered from discriminatory hiring and promotional practices in large institutional law firms. While some groups have overcome the barriers which once confronted them, others remain excluded. The history of the legal profession illustrates that the process of deciding who will be promoted from associate to partner at these firms is marred by widespread religious, racial and sex discrimination. Those groups who are being victimized today should have redress under the law. Moreover, history should not be allowed to repeat itself so that those groups which have successfully surmounted those barriers again fall prey to discrimination. *Amici* request that this Court not place its imprimatur on discrimination in the partnership decisional process at large institutional firms.

Prior to World War II, Jewish lawyers were, with some exceptions, excluded from partnership in large institutional firms.[1] In his autobiography, Milton Gould, a senior partner in the New York City law firm of Shea & Gould stated, "[t]he ugly fact is that until the coming of the New Deal and World War II, the doors of the prestigious law firms in New York were virtually

1. J. Auerbach, *Unequal Justice* (1976) at 29.

closed to Jews and other minorities. . ."[2] Even in New York City, where approximately sixty percent of the bar is Jewish, for the better part of the twentieth century few Jewish partners were to be found among the Wall Street firms.[3]

At first, the barriers that existed towards Jewish lawyers prevented them from even securing entry level positions. In 1949, Joseph Proskauer, a senior partner at Proskauer Rose Goetz & Mendelsohn recorded his experience as follows:

> . . . It did not take me many days to discover that the doors of most New York law offices in 1899 were closed with rare exceptions, to a young Jewish lawyer. Fifty years have elapsed since then and I am happy to record that there has been a distinct improvement in the situation; though it still remains true that generally the Jewish student must qualify twice for such employment.[4]

Although the period between 1899 when Joseph Proskauer first attempted to find employment and 1949 when he recorded his observations saw Jewish graduates of the Ivy League law schools being employed at large institutional firms, Jewish lawyers were still for the most part barred from the partnership.

Moreover, there was the problem of self-perception. Studies commissioned in the 1950's and 1960's by both the Anti-Defamation League of B'nai B'rith and the American Jewish Congress reflected the fact that Jewish law students and lawyers believed that these large firms discriminated against Jews and that hence "it would be a waste of time to apply."[5] These same people declined to accept positions with the large institutional firms even if they were offered employment because they feared that they

2. P. Hoffman, *Lions of the Eighties* (1982) at 202.

3. J.E. Carlin, *A Survey of the New York City Bar* (1966) at 19.

4. J.M. Proskauer, *A Segment of My Times* (1950) at 30.

5. Note, *The Jewish Law Student and New York Jobs—Discriminatory Effects in Law Firm Hiring Practices*, 79 Yale L.J. 625, 654 (1964) (hereinafter, Note, *The Jewish Law Student*). *A Survey of the Employment Experiences of Law School Graduates of Chicago, Columbia, Harvard and Yale Universities*, American Jewish Congress, Commission on Law and Social Action (May, 1954) (unpublished manuscript) at 2.

would never be offered a partnership share.[6] Thus, fear of discriminatory treatment may have caused Jewish lawyers to perpetuate the religious imbalance at these large firms.

Nor were the Jews the only victims of religious discrimination. For a time Catholics too felt the sting of disparate treatment. Although the doors of large institutional firms were opened to Catholics long before they were opened to Jews, Donovan Leisure Newton & Irvine was reported to have been founded in 1929 by William Donovan because as a Catholic, he had faced discrimination at the Wall Street firms.[7]

An honest appraisal of the status of Jewish lawyers in the bar today reveals that the picture has changed. A study done by the Yale Law Journal in 1964 at the request of the Anti-Defamation League revealed "that straightforward prejudice [against Jews] has been on the wane for years and [will] continue to decline in importance."[8] Other groups such as blacks, Hispanics and women still face tremendous barriers to success at these large law firms. More than two-thirds of these firms have no black partners and over three-quarters of these same firms have no Hispanic partners.[9]

At issue in the instant case is the propriety of considering the race, sex or ethnicity of an attorney up for promotion into a large institutional partnership. *Amici* submit that the law does not allow these factors to be utilized.

6. Note, *The Jewish Law Student*, *supra* at 655.
7. Hoffman at 204.
8. Note, *The Jewish Law Student*, *supra* at 653.
9. Margolick, *The Blue-Chip Firms Remain Mostly White*, New York Times, Feb. 13, 1983 at 57, Col. 1. The situation with respect to women at these firms has been addressed in petitioner's brief, as well as in the briefs of other *amici*.

II

THE PARTNERSHIP DECISIONS OF INSTITUTIONAL LAW FIRMS ARE PROPERLY SUBJECT TO TITLE VII JURISDICTION

Title VII must be held to apply to the decision to offer a partnership to an associate in a law firm otherwise subject to Title VII jurisdiction, in order to effectuate the sound purposes underlying its enactment. In failing to so hold, the lower courts erred by:

(1) Unnecessarily limiting the scope of Title VII statutory jurisdiction;

(2) Giving credence to a "right of voluntary association" of constitutional dimension which should not exist for a partnership organized for a commercial purpose; and

(3) Failing to balance any such right of voluntary association with Congress' regulatory power under the Commerce Clause.

A. Hishon's Complaint States a Valid Claim Under Title VII

There can be little doubt that the claim stated by Hishon is covered by Title VII. First, the relationship that large institutional law firms have with their associates clearly falls within the ambit of Title VII. *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974); *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977); *Blank* v. *Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975). Congress explicitly included "partnerships" in Title VII. 42 U.S.C. § 2000e(a).[10] These firms, including King & Spalding, employ more than the statutorily required fifteen persons. Further, the non-discriminatory consideration for promotion to partner while associates are still employees is a "term, condition or privilege of employment" explicitly

10. The Equal Employment Opportunity Commission also took the position that a law partnership was explicitly covered by Title VII in its *amicus* brief before the Eleventh Circuit.

covered by Title VII.[11] Further, the decisions below rest in part on a belief that Title VII should not apply to promotion practices which are based on subjective as well as objective criteria. The district court explicitly noted that "in professional partnerships, new mates or partners are sought and bethrothed for different reasons and to serve different needs of the partnership." 25 Empl. Prac. Dec (CCH) ¶ 31,703 at 20.062. However, when Congress amended Title VII in 1972 to include promotion and tenure decisions made by educational institutions, it clearly indicated that upper-echelon jobs, which take into account subjective as well as objective factors, are covered under Title VII. During the debate on a proposed amendment to Title VII which would have excluded physicians employed by private or public hospitals from coverage under the statute, Senator Javits said:

> . . . this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them. 118 Cong. Rec. 1463-64. (1972).

So, too, the courts should not abdicate their role in remedying discrimination merely because subjective criteria can be more difficult to review. One court has stressed that simply because a decision to hire or promote may be subjective,

> does not mean that such judgment cannot or should not be subjected to close scrutiny in order to determine whether such judgment is being exercised in good faith or merely as a pretextual cloak for disguising racial discrimination. In fact, *it is precisely because such an evaluation, highly*

11. In this regard, the Eleventh Circuit's majority opinion conflicts with another federal court's holding on this issue. *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123, 128 (S.D.N.Y. 1977). *See also* Note, *Applicability of Federal Anti-Discrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282, 286-292 (1976).

> *subjective as it is, may mask racial bias, that it must be rigorously reviewed. Milton* v. *Bell Laboratories, Inc.*, 428 F. Supp. 502, 507 (D.N.J. 1977) (emphasis added; citations omitted).

See also Kunda v. *Muhlenberg*, 621 F.2d 532, 548 (3rd Cir. 1982) (college tenure and promotion procedure may not be used as a mechanism to obscure discrimination); E. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

The evaluation of an individual for promotion to partner or discharge for failure to be promoted to partner may involve considerations which cannot be quantified. The application of Title VII to law partnership decisions would not require that the most objectively qualified associate be made partner—promotion to partnership is a business decision which includes analysis of factors other than an associate's ability to conduct legal research. What such application of Title VII *would* require is that the law firm, in deciding which associates to promote to partnership, not utilize race, sex or ethnicity as factors. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Lieberman* v. *Gant*, 630 F.2d 60 (2d Cir. 1980). The Eleventh Circuit has departed from this fundamental principle by immunizing promotional decisions from the application of Title VII.

Clearly, discriminatory partnership decisions can have an impact upon the hiring decisions of a law firm at the associate level. This the courts have already recognized as falling within the ambit of Title VII. *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094; *Blank* v. *Sullivan & Cromwell*, 418 F. Supp. 1. It would be ironic indeed if a law firm could avoid its clear statutory responsibility to hire associates without regard to their race, religion, national origin, or sex by indirectly discouraging applicants through an allegedly lawful refusal to offer them partnerships after they have worked for the firm for the required number of years. The effect of such a holding is clear. The partners of a large law firm could presumably make the following statement to the law student population:

> This law firm offers employment to qualified law school graduates without regard to race, color, religion, sex, or national origin. We will provide equal work assignments, wages, and other conditions of employment to all associates without regard to ethnic criteria. However, the partnership will not accept into its ranks any woman, black or Hispanic associate.

Hishon alleges that this was effectively King & Spalding's policy. This says to minority and female law students throughout the nation that the partnership doors in major law firms may be closed to them and that such action cannot be addressed under Title VII.

The district court below noted that the lack of similar law suits indicates that no problem exists which warrants judicial intervention. To the contrary, the lack of judicial activity merely demonstrates the fear and futility felt by minority and female lawyers seeking to break into a closed fraternity. Hishon was fortunate enough to obtain a partnership in another firm and thus can afford the risk of suing her former employer. More typically, an unsuccessful partnership candidate is dependent in large measure on his or her former employer for references.

Opportunity should be available to talented individuals to be promoted to all levels within these large firms without regard to race, sex, religion or national origin. The application of Title VII to these promotional decisions insures that this occurs in a non-discriminatory manner.

B. A Commercial Enterprise Has no Constitutionally Protected Right of Association

Although the lower courts did not base their rulings directly on a "right of freedom of association", the rulings of both courts appeared to be influenced by the theory that "partnership" is a *"voluntary association* of two or more persons" whose "very essence is the *voluntary joinder* of all partners with each other." 678 F.2d at 1028 (emphasis added). The district court strongly implied that it would have held Title VII unconstitutional if it found that Title VII applied to the selection of partners by a law

firm. 25 Empl. Prac. Dec. (CCH) at 20,062. The majority of the court of appeals resisted the application of Title VII to King & Spalding because it would be "encroaching upon individuals' decisions to *voluntarily* associate in a business partnership." 678 F.2d at 1028 (emphasis added).

This Court first recognized the right of voluntary association in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1957) in which the state of Alabama sought records and membership lists from the NAACP ostensibly to enforce its foreign corporations' regulations. The Court held that the enforcement of the law impermissibly interfered with members' associational rights because it tended to discourage participation in the NAACP. However, the right of voluntary association was found to exist only because the primary purpose of the association was to engage in protected First Amendment activities:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . .It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an unseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech. . . . (citations omitted) *Id.* at 460.

From the time of *NAACP* v. *Alabama* to the present, this Court has not recognized an unlimited constitutional right of voluntary association which protects otherwise unlawful activity merely because it is done in concert. Rather, this Court has established a more restricted right to join with others to pursue goals independently protected by the First Amendment. Thus, a right of association exists where individuals join together for political advocacy, *Cousins* v. *Wigoda*, 419 U.S. 477 (1975); religious worship, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); and to secure access to the judicial system for redress of grievances on behalf of people who would not otherwise be able to do so, *NAACP* v. *Button*, 371 U.S. 415 (1963).

An individual who is an employer, covered by Title VII, is not free to discriminate on the basis of race, sex, religion or national origin. That individual is not acting with others to pursue protected First Amendment rights. While an individual may be free to discriminate in his private life, that freedom is lost when he joins with others in an employment relationship. Congress, by enacting Title VII, saw fit to proscribe such conduct. As this Court noted in *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973), not only is there no affirmative constitutional right to discrimina.., but Congress may make discrimination unlawful. King & Spalding cannot enlarge its right of voluntary association to permit it to engage in otherwise prohibited conduct merely because a group of individuals have formed together in a professional partnership to pursue business goals.[12] A professional partnership or association engaged primarily in a business enterprise does not lose its character as a business merely because professionals are involved. *See* 118 Cong. Rec. 1463-64 (1972) (statement of Senator Javits).

Just as Congress has the power to ban discrimination, it can also carve out exceptions to this prohibition. The coverage of Title VII in fact was not extended to employers who employ less than fifteen employees. 42 U.S.C. § 2000e(b). In addition, Congress created an exemption for religious corporations, associations and educational institutions when exercising preferential employee selection in carrying out the activities of these organizations. 42 U.S.C. § 2000e(2)(e). Similarly, the ban upon discrimination in places of public accomodation contained in Title II of the Civil Rights Act of 1964 does not apply to clubs that are truly private in nature. 42 U.S.C. § 2000a(e). And, Title VIII, the Open Housing Act of 1968, contains an exemption for single family dwellings, 42 U.S.C. § 3603(b)(1); the boarding house in which the owner lives so long as it contains no more

12. *See Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976), where this Court noted that even if "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable. . . it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."

than three other units for families living independently, 42 U.S.C. § 3603(b)(2); purely private clubs which give preference to their members in housing not operated on a commercial basis, 42 U.S.C. § 3607; and religious organizations that own or operate housing for other than commercial purposes, 42 U.S.C. § 3607. These specific congressional exemptions do not, however, give rise to an unfettered right of voluntary association for other than the assertion of protected First Amendments rights.

Moreover, even in certain circumstances where Congress has carved out an exemption to the Open Housing Act and the Public Accomodations Law for private clubs that might assert a right of association akin to that being argued by King & Spalding herein, it did not wholly extend that exemption to commercial activities. Explicit in the Open Housing Act is the requirement that private clubs may not discriminate in providing housing to its members if the housing is operated for commercial purposes. Under Title II, indicia that a club is not private are the predominance of profit motive, *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Ct. 1974) and whether it is a commercial enterprise operated for the benefit of a small group. *Wright* v. *Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970).

Accordingly, little if any protection attaches to a right of association for commercial purposes.[13] In *Garcia* v. *Texas State Board of Medical Examiners*, 421 U.S. 955 (1975), *aff'g mem.*, 384 F. Supp. 434 (W.D. Tex. 1974), no such right of association was found by the court to exist for a group medical practice set up to provide low-cost medical care to low-income groups. There, a group of non-physicians who had banded together to deliver these services sought to challenge a Texas statute prohibiting laymen from forming corporations to practice medicine. The district court rejected the freedom of association argument finding that "plaintiffs do not seek to engage in activity protected under the First Amendment or any other Constitutional provision . . .", but

13. This Court has been consistently less solicitous of commercial activities even when connected to the clear First Amendment right of free speech. *See, e.g., Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

are merely associating together for the purpose of practicing medicine without a license. 384 F.Supp. at 439. In *NAACP* v. *Button*, 371 U.S. 415 (1963), however, this Court upheld the right of association for a group of legal practice, where litigation was being used as a form of political advocacy. The NAACP was utilizing the judicial process to break down racial barriers and to secure rights for the minority group it was representing.

The right of association was also recognized in *In Re Primus*, 436 U.S. 412 (1978). The American Civil Liberties Union extended an offer of free legal assistance to a gathering of women who had been sterilized as a condition of receiving public medical assistance. The offer of legal assistance came in conjunction with addressing these women to advise them of their legal rights stemming from the sterilization. This was held to be within the zone of First Amendment protection reserved for "associational freedoms" in that "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating information to the public." *Id.* at 432. In contrast, that same day, this Court upheld disciplinary action taken against an attorney for an in-person solicitation of a client in a hospital room. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). This, the Court reasoned, involved nothing more than commercial activity and was not entitled to constitutional protection. Thus, where the solicitation directly related to the expression of ideas it was upheld, but where it implicated no more than a profit motive it was denied.

Institutional law firms like King & Spalding are clearly not primarily engaged in political, ideological, social or religious advocacy when making hiring or promotion decisions, but rather in ordinary professional business activities. Beyond the actual practice of law, these firms must consider how to attract clients, what fees to charge, what salaries to pay and how partnership shares should be allocated. Hiring, recruiting and promotion practices are clearly business activities related to considerations of profitability and productivity and are therefore within the scope of Title VII.

The use of the partnership form of organization appears to be unconnected with the nature of the lawyer's practice or his/her relationship with clients. Historically, the partnership form was "basically the only organization in which [lawyers] could practice, since incorporation ws forbidden by licensing laws or professional tradition." J. Crane and A. Bromberg, *Law of Partnerships* at 182 (1968); *see* Note, *Tenure and Partnerships as Title VII Remedies*, 94 Harv. L. Rev. 457, 463 (1980). Today, lawyers practice law as solo practitioners, in the partnership form or in professional corporations. Some partnerships have both equity and non-equity partners. The association of lawyers in partnerships to practice law is premised essentially upon business considerations. The choice of the partnership structure was never meant to sanction discriminatory conduct, if such conduct was otherwise made illegal for business enterprises.

The courts below sought to justify this type of discrimination by partnerships by resting it upon the right of privacy. Analogizing a law partnership to a marriage, the district court cited *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) for the proposition that the "privacy interests" of the more than sixty "spouses" to the King & Spalding "marriage" outweigh Congress' power to outlaw sex discrimination. Yet the *Griswold*-privacy line of cases is factually inapposite here. In *Griswold*, the Court recognized a right of privacy to use contraceptives in the home. Cases following *Griswold* likewise involve the right of privacy to protect intimate personal or family relationships. *See, e.g., Roe* v. *Wade*, 410 U.S. 113 (1973) (right of privacy restricts governmental interference with abortion decisions); *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (right of privacy protects minors' abortion decisions). This right has never been extended beyond the context of that type of intimate or familial relationship. Whatever may be the extent of the right of privacy in the home, it cannot be invoked to permit a major business and professional enterprise such as King & Spalding to engage in discrimination when such discrimination is forbidden to other businesses.

C. Congress' Power Under the Commerce Clause to Prohibit Discrimination Overrides Any Right of Voluntary Association Which May Exist

In recognizing King & Spalding's right to discriminate, both the district court and the court of appeals paid little attention to the source of congressional power in enacting anti-discrimination legislation. Article I § 8 of the United States Constitution empowers Congress "to regulate Commerce. . . among the several States." King & Spalding[14] and most other large law firms engage in their legal activities without regard to state borders. They have placed themselves into interstate commerce and therefore are subject to regulation under the Commerce Clause.

Congress' power to legislate under the Commerce Clause includes the power to regulate the American labor market. As Justice Stevens stated in his concurrence in *EEOC* v. *Wyoming*, ___ U.S. ___, 51 U.S.L.W. 4219 (Mar. 2, 1983), "[t]oday, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy." *Id.* at 4225. *See also United States* v. *Darby*, 312 U.S. 100 (1941); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Employment legislation is a natural outgrowth of the Commerce Clause. This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), stated that "the objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 430.

King & Spalding asserts that the right of voluntary association precludes the application of Title VII to its promotional decisions. Even assuming *arguendo* that a right of voluntary association exists at large institutional law firms, that right must be weighed against the commerce power.

This is not the first time that this Court has been called upon to weigh Congress' right to ban discrimination under the Commerce

14. King & Spalding has in fact opened offices across the country and employs lawyers licensed to practice in more than one jurisdiction.

Clause against another asserted constitutional right. Thus, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court upheld Title II of the Civil Rights Act of 1964, the Public Accommodations Law, 42 U.S.C. §2000a, against charges that application of that Act to the motel in question amounted to a deprivation of liberty or property under the Fifth Amendment. More recently, in *EEOC* v. *Wyoming*, 51 U.S.L.W. 4219, this Court affirmed Congress' power under the Commerce Clause to apply the Age Discrimination in Employment Act of 1967 (ADEA) to state government employees. The state of Wyoming had asserted that this was a purely local matter reserved to the states under the Tenth Amendment.[15] The Court reached its conclusion by finding that (1) Congress had explicitly included state and federal workers within the coverage of the ADEA; (2) Congress had a compelling interest in prohibiting age discrimination; and (3) the applicability of the ADEA did not directly impair the states' ability to "structure their integral operations in areas of traditional governmental functions." *Id.* at 4222.

Although King & Spalding relies on the First Amendment, rather than the Tenth Amendment, the Court's analysis in *EEOC* v. *Wyoming* is instructive. First, as demonstrated above, the relationship that large institutional law firms have with their associates clearly falls within the ambit of Title VII, *see* pp. 8, 10, *supra*. Second, prohibiting discrimination is clearly a compelling governmental interest. Third, the application of Title VII to promotional decisions will not impair King & Spalding's ability to structure its internal operations. They will still be able to promote those candidates that are best suited for partnership at the firm. They will simply not be permitted to do so in a discriminatory manner.

15. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment X.

CONCLUSION

For the foregoing reasons, the judgment of the Courts below should be reversed and Title VII should be held applicable to the promotional process at large institutional law firms.

Respectfully submitted,

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